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MEMORANDUM OF LAW

DATE: October 28, 1996

NAME: Penelope Culbreth-Graft, Assistant City Manager, City Manager's Office
Tina Christiansen, Director, Development Services Department

FROM: City Attorney

SUBJECT: Modifications to California Terraces Project

QUESTION PRESENTED

What legal issues should the City Manager consider in evaluating Pardee Construction Company's ("Pardee") application for substantial conformance review of proposed modifications to the California Terraces Project?

BACKGROUND

Pardee has provided our office with factual information and legal arguments supporting their request for ministerial approval of proposed modifications to the California Terraces Project. See, Exhibit A. Our office has also reviewed the modified subdivision map for the project recently submitted by Pardee to the City Manager. We have taken into consideration the action of the City Council on July 2, 1996. At that hearing, policy direction was given to the City Manager to utilize substantial conformance review procedures to consider any and all revisions, modifications or redesigns of previously approved projects when the changes are associated with implementation of the Multiple Species Conservation Program ("MSCP"). Finally, we have independently researched the legal latitude we believe you have under state and local authority to ministerially approve modifications to an approved project.

ANALYSIS

The controlling legal authority for your decision is found in the Subdivision Map Act ("Map Act") at Government Code section 66456 and San Diego Municipal Code ("Municipal Code") at section 111.1010(e). Ministerial approval of modifications to an approved tentative map or land use plan is legally permissible under both the Map Act and our Municipal Code when the modifications are "minor" in nature and the changes substantially conform to the "objectives, standards, guidelines and conditions" of the previous approvals.

The law which allows minor changes to approved projects and maps implicitly precludes ministerial approval of major changes. This prohibition on major changes is grounded on the premise of fairness to both the developer and to the public interest by requiring governing bodies to render discretionary decisions about the project at open public hearings when the governing body acts on the tentative map and certifies the environmental document. See, Approval of Tentative Subdivision Map, 63 Op. Cal. Att'y Gen. 844 (1980).

The previously approved vesting tentative map for the California Terraces Project contained the typical condition for the applicant to seek and obtain all necessary approvals from the State Department of Fish and Game and the U.S. Fish and Wildlife Service ("Wildlife Agencies"). In their review, the Wildlife Agencies are primarily concerned about the preservation of sensitive habitats, the indirect impacts of development immediately adjacent to sensitive habitats, and the open space configuration within the project design. We think there is ample support in the law for utilizing substantial conformance review procedures to approve those modifications to the California Terraces Project which are in furtherance of satisfying the Wildlife Agencies. This would include any changes to the project which make it consistent with the proposed MSCP, provided that those changes do not raise the potential for adversely increasing environmental impacts¹.

Any modifications being proposed to the vesting tentative map and the project which are not related to satisfying concerns of the Wildlife Agencies, such as changes to lot configuration, street design and zoning, may still be approved through a ministerial action. However, because those changes are not in satisfaction of a condition of the previously approved vesting tentative map, we would advise you to use greater scrutiny in evaluating those proposed modifications. You should use your best professional judgment to first determine if you have enough empirical information. Then, if you have enough information, analyze it to compare the project "as a whole," as it was previously approved, versus the project "as a whole," as proposed for modification. The changes can be approved ministerially if you determine that they are minor in nature and consistent with the objectives, standards, guidelines and conditions of the precise plan

¹Adverse impacts greater than those identified in the previously certified EIR.

and approved map. The Map Act and the Municipal Code do not require you to ministerially approve the requested modifications, even if it would be legally permissible to do so². However, we interpret the recent action of the City Council to be general direction to the City Manager to accept those changes to the California Terraces Project which are within the legal bounds of substantial conformity as set forth in the Municipal Code and state law.

Lastly, you should be aware that the Map Act requires all final maps to conform with the Progress Guide and General Plan for the City. Therefore, prior to or concurrent with approval of the final map for California Terraces (as modified), the companion changes to the precise plan should be considered and acted upon by the City Manager utilizing the substantial conformance review procedures for minor modifications set forth in the precise plan.

We would be happy to meet with you to discuss these issues in greater detail if you so desire.

JOHN W. WITT, City Attorney

By

Richard A. Duvernay
Deputy City Attorney

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Attachment

cc Gary Halbert

Mike Stang

ML-96-51

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² Ordinary mandamus is used to review ministerial actions. State v. Superior Court (Veta Company), 12 Cal. 3d 237 (1974). The judicial inquiry to challenge a ministerial action is limited to a determination of whether (a) the action was arbitrary or capricious, (b) entirely lacking in evidentiary support, or (c) whether the city has failed to follow the procedures required by law. Arnel Development Company v. City of Costa Mesa, 28 Cal. 3d 511 (1980).